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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 595.

MRS. FANNIE E. LANG, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR THE PETITIONER.

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Of Counsel.

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BRIEF FOR THE PETITIONER.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 61 Fed. (2nd) 280 (R. 20-28).

The opinion of the Board of Tax Appeals is reported in 23 B. T. A. 854 (R. 10-14).

II.

JURISDICTION.

1. The date of the judgment to be reviewed is October 8, 1932 (R. 29).

2. A petition for writ of certiorari was filed January 4, 1933, and was granted by this Court on February 6, 1933 (R. 31).

3. This is a case arising under the income tax laws and involves the construction of the statute relative to estates by the entirety, which has not heretofore been considered by this Court.

4. Petitioner and her husband purchased a piece of real estate in 1915. Petitioner contributed 12% of the purchase price and her husband contributed 88%. Title to the property was taken by them as tenants by the entirety (R. 11). The husband died in 1924. Petitioner was executrix of his will and sole beneficiary thereunder (R. 11). This real estate was included in the estate tax return and a Federal estate tax, based upon the value of the husband's interest in said real estate at the time of his death, was paid (R. 11). This real estate was sold in 1925 by the petitioner for the same sum as it was appraised at in 1924 (R. 11). In making her income tax return for that year she treated 88% of the sale value of said real estate (the share of the purchase price contributed by her husband) as having been received by her at his death in 1924.

However, the Commissioner of Internal Revenue made a computation based upon the price paid in 1915 and its sale in 1925, disregarding altogether the fact of the death of the husband and the inclusion in his estate of the value of his interest in said property, at its then value, and the payment of the Federal estate tax thereon (R. 6, 7).

5. The jurisdiction of this Court is invoked under the provisions of the Judicial Code, Section 240, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347).

III.

QUESTIONS PRESENTED.

Petitioner contends that a deficiency in income tax assessed against her for the year 1925 in the amount of $1,355.81 was in error, in that certain real estate sold by her in 1925 having been acquired by her and her husband in 1915 as tenants by the entireties, the correct basis for determination of gain or loss on such sale is the value of the interest of her husband therein which was transferred to her at the time of his death in 1924 plus the cost of her interest therein at the time of the purchase (R. 12). The Circuit Court of Appeals denied this claim (R. 27).

Petitioner further contends that her husband, the other tenant by the entirety, died possessed of a definite financial interest in the real estate, which interest was transmitted by operation of law to her as the surviving tenant by the entirety. That this interest constituted a definite part of the corpus of his estate for the purpose of the Federal estate tax and was made the subject of said tax. That the inclusion of this interest in the decedent's taxable estate fixed both its status and value as an interest transmitted at or by reason of death, and that this transmission was by way of bequest, devise or inheritance within the meaning of the statute (R. 12). The Circuit Court of Appeals denied this claim (R. 25).

Petitioner further contends that the inclusion of a special interest in property as corpus of an estate for estate tax purposes fixes its status in the hands of the decedent and that it becomes and remains corpus as to income tax procedure. No part of its value so fixed as corpus can become gain or income in the hands of a fiduciary or any beneficiary or distributee of said estate

as the result of realizing on it through subsequent sale. Only the excess realized above that corpus value would constitute income or gain.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that for income tax purposes, property must be deemed acquired by taxpayer when she and her husband purchased it as tenants by the entireties.

2. The Circuit Court of Appeals erred in finding and holding that within the meaning of the income tax law the devolution of the property rights upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety, is not an acquisition by "bequest, devise or inheritance."

3. The Circuit Court of Appeals erred in refusing to hold that the inclusion of the interest of the husband in this real estate in his estate for estate tax purposes fixed its status as corpus and that it became and remained corpus as to income tax procedure, and that no part of its value so fixed as corpus could become gain or income as the result of realizing on it through subsequent sale, but that only the excess realized above that corpus value would constitute income or gain.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A.

The decision below is contrary to and in conflict with prior decisions of this court and the Circuit Court of Appeals for the Seventh Circuit.

POINT B.

The statute shows that it was the intention of the Congress to impose but one tax upon each increase in value of property and this intention should be given effect.

POINT C.

The interest of the husband in property held as a cotenant by the entirety having been cast upon the surviving tenant by operation of law at his death and having been ascertained and taxed as a part of his estate, said interest became corpus and is not subject to taxation under the income tax law. Only the excess realized above that corpus value is income.

POINT A.

THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The statute involved is Section 204(a) of the Revenue Act of 1926, which provides:

> "Sec. 204(a). The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28th, 1913, shall be the cost of such property; except that * * *.
>
> (5) If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision * * * (c) or (f) of Section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of Section 302 of this Act." U. S. C. A., Title 26, Sec. 935.

The estate tax provisions of the Statute and the regulations are set out in full in the opinion of the Court below (R.23) and in the interest of brevity are not repeated here.

Section 302 of the Act above referred to is a part of the estate tax provisions of the statute and subdivisions (c) and (f) refer to transfers in trust or otherwise *causa mortis*, and property passing under a general power of appointment exercised by the decedent, respectively.

Subdivision (e) of said section (302) provides for the imposition of the estate tax on tenancies by the entirety and the property here involved was taxed thereunder upon the death of the husband to the extent of 88% of its appraised value, that 88% being the interest of the husband therein.

In Tyler v. United States, 281 U. S. 497; 8 A. F. T. R. 10912: this Court construed the Act of 1916 as to the estate tax upon property held as tenants by the entirety, the provisions of which—Sec. 202(c)—are identical with the provisions of the 1926 Act—Sec. 302(e). There, this Court, in upholding the constitutionality of the estate tax upon the interest of the deceased tenant by the entirety said that the amiable fiction of the common law by which husband and wife are but one person and therefore upon the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other, seems unsubstantial when applied to a taxing act. That actual results rather than artificial rules should govern. It is then held (p. 504):

> "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

In Phillips v. Dime Trust & Safe Deposit Co., 284 U. S. 160; 10 A. F. T. R. 459: this Court said that the Tyler case held that the "tax imposed under Sec. 202(c) Revenue Act of 1916, was a valid indirect tax, measured by the value of the property, *rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety.*" (Italics supplied.)

In the case at bar the Circuit Court of Appeals distinguishes it from the Tyler case on the ground that, for estate tax purposes the Congress has expressly enumerated estates by the entirety, but that in the income tax portion of the statute, the Congress has omitted to enumerate estates by the entirety in designating the character of transfers to which the standard of value at the time of acquisition shall apply, saying:

> "In the statute here under consideration there is no such express use or enumeration of estates by the entirety, and it follows that, *if* they cannot be regarded as 'inheritances' the property in question, under the Maryland law, must be regarded for income tax purposes as being acquired by the petitioner at the time she and her husband purchased it, and valued as of that date and not as of the date of her husband's death." (R. 27.)

That Court does not discuss whether or not the devolution of these property rights upon the surviving tenant can be regarded as "inheritances" but, by affirming the decision of the Board of Tax Appeals, it necessarily holds that they cannot be.

In the case at bar the husband devised his entire estate to his wife (R.11).

In Commissioner v. Fletcher Savings and Trust Co., Executor, 59 Fed. (2nd) 508: the Circuit Court of Appeals for the 7th Circuit held that in a case of tenancy by the entireties the wife took the interest in the realty which her husband held at the time of his death by "inheritance" as that word may be fairly construed.

In that case, as in the case at bar, the sole issue was as to how the wife acquired the interest in the realty which her husband had at the time of his death. In both cases the title to the property was, during the lives of both spouses, held as tenants by the entirety. In both cases the statutes exempted from the computation in arriving at the tax to be imposed property acquired by "bequest, devise or inheritance" and in both cases the wife was the sole beneficiary under her husband's will.

It is inconceivable that the Congress, when it used the generic term, "bequest, devise or inheritance" in Section 204(a) of the statute, did *not* intend it to embrace the interest which devolves upon the surviving tenant upon the happening of an event—the death of the other tenant by the entirety—but that when it used the same term, "bequest, devise or inheritance" in Section 303(a) (2) of the same statute it *did* intend to embrace the same interest.

This is an important question of Federal law, upon which two Circuit Courts of Appeal have reached opposite conclusions, and which has not been but should be settled by this Court.

The effect of the decision of this Court in the Tyler case (281 U. S. 497) is that for Internal Revenue Tax purposes, the "amiable fictions of the common law" as to tenancies by the entirety are to be disregarded and the devolution of property is to be looked at from a practical standpoint. The acquisition of rights in real estate, upon

the death of the owner of these rights, would seem to be, from a practical viewpoint an acquisition by inheritance.

It is a forced and unnecessary construction to hold that the Congress intended that these rights of property should be recognized up to the moment of transfer to and acquisition by the surviving tenant for the purpose of taxing, then *eo instanti* they should pass out of existence forever.

The estate tax part of the statute is borrowed from the English "Death duties" and "Succession duty" acts of Parliament.

Knowlton vs. Moore, 178 U. S. 41-52.

> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

ibid P. 57.

> "Of course, they (death duties) concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

ibid P. 78.

POINT B.

THE STATUTE SHOWS THAT IT WAS THE INTENTION OF THE CONGRESS TO IMPOSE BUT ONE TAX UPON EACH INCREASE IN VALUE OF PROPERTY AND THIS INTENTION SHOULD BE GIVEN EFFECT.

The terms, "by purchase, gift, bequest, devise or inheritance" would seem to embrace all of the means or channels through which property is acquired and it must

be assumed that the Congress, when it used these terms, intended to embrace all of the channels through which property can be acquired.

These terms are used alike in the statute in both the estate tax and income tax provisions.

Granting that the estate tax provisions "are a part of the general plan to prevent avoidance of taxation," consistency requires that the very principles, upon which the prevention of such avoidance rests, should be recognized and adhered to when subsequently dealing with the same interests and their values in relation to the surviving spouse whose interest in the property was affected by the adoption of such principles.

The Congress having in mind the fact that property could escape bearing its just proportion of death duties, if the title was held as joint tenants or tenants by the entirety, took the precaution in enumerating the sources of death duties to specifically mention the interest of the deceased in property held jointly or by the entirety in framing the estate tax law. The rule of property therein set up in respect to all joint tenancies (including tenancies by the entireties) is that the joint interest is divided into parts, in the proportion of the respective financial interests of the co-tenants, according to their percentage of contribution to the cost of the property. That is, the statute looks upon the co-tenants as though they were tenants in common with the right of survivorship. This rule of property—an artificial one to be sure, but a rule nevertheless—set up and applied for the purpose of practical taxation, is necessarily two-fold, in that it affects both the decedent and the survivor, because in defining the interest of the decedent and its value at his death, it also establishes the post mortem interest of the

survivor and its value to her. It follows, therefore, that the interest which passed to the wife from her husband at his death had imparted to it, under this rule of property, the quasi-character of inheritance, and that it retains this character for the purpose of the income tax.

A transfer of property from an owner at death to a living person by operation of law, in common acceptance, is an inheritance.

In U. S. v. Tyler, 33 Fed. (2nd) 724 (C. C. A. 4th Cir.) it is said:

> "We see no reason why the casting of the entire estate upon the survivor, which takes place by operation of law in case of the death of one of the tenants by entireties, cannot be made the basis of taxation as well as the casting of succession upon the heir, which takes place in the case of intestate succession. The surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other; and in both cases it comes by operation of law."

"Inheritance" as used in a statute, will be construed to mean any property passing by death to those entitled to receive it, and includes whatever is transmitted by descent or succession.

Adams v. Akerlund, 168 Ill. 632; 48 N. E. 454-7;
Glascott v. Bragg, 111 Wis. 605; 87 N. W. 853;
In re: White's Estate, 42 Wash. 360; 84 Pac. 831-2.

The Circuit Court of Appeals for the 7th Circuit has reached the conclusion that the transfer of these interests from the husband to the surviving wife comes to her by way of inheritance.

In Commissioner v. Fletcher Svgs. & Trust Co., Exer., 59 Fed. (2nd) 508: the only difference in facts is that there the deduction had been made by the executor of the formerly surviving spouse in its estate tax return, while here the sale was made by the surviving spouse. There, after stating that the right to deduct depended upon whether the transfer of that interest to the surviving spouse from her husband's estate came by way of gift, bequest, devise or inheritance, the Court said:

> "We think the word 'inheritance' may be fairly construed to include this transfer, and we are convinced that Congress so intended it. While in legal parlance we generally regard the meaning of the word 'inheritance' as the acquisition of property by one person as heir to another, yet it also means the act of possessing, receiving, obtaining, or succeeding to. The right to receive the entire property upon her husband's death came from the deed which created the estate by the entirety. The transfer to her of the interest therein which her husband had at the time of his death, and which transfer was necessary for her to completely hold and enjoy that right which the deed had given her, came from her husband's estate. She succeeded to her husband's right. She received and obtained and came into possession of it, and in that sense we think she must be considered as having inherited it from her husband's estate."

The construction placed by the Court below upon the statute is to the effect that this interest is not transmitted by devise or inheritance. Therefore because the Congress has neither created a special term to describe this passing, nor described the interest in detail; this one method of acquiring property, be it called succession or something else, is to be singled out and set apart from all other known methods of acquiring property and thus made the subject of double taxation. In the instant case, if, instead of taking title as tenants by the entirety, the

conveyance had been to the husband and wife as tenants in common, there could be no question but that petitioner's contentions as to the method of determining the tax would be followed, but because of the language of the title deed, the result, according to respondent's contention, is that the increase in value over cost price shall be taxed twice, once to the estate and a second time to the petitioner. Such a construction is to be avoided, if possible.

Knowlton vs. Moore, 178 U. S. at P. 77.

POINT C.

THE INTEREST OF THE HUSBAND IN PROPERTY HELD AS A CO-TENANT BY THE ENTIRETY HAVING BEEN CAST UPON THE SURVIVING TENANT BY OPERATION OF LAW AT HIS DEATH AND HAVING BEEN ASCERTAINED AND TAXED AS A PART OF HIS ESTATE, SAID INTEREST BECAME CORPUS AND IS NOT SUBJECT TO TAXATION UNDER THE INCOME TAX LAW. ONLY THE EXCESS REALIZED ABOVE THAT CORPUS VALUE IS INCOME.

The inclusion of special interests as corpus of an estate, for Estate Tax purposes, fixes their status in the hands of the decedent and they become and remain corpus as to income tax procedure. No part of their value so fixed as corpus can become gain or income in the hands of a fiduciary or any beneficiary or distributee of said estate, as the result of realizing on them through subsequent sale. Only the excess realized above that corpus value would constitute income or gain.

Nichols v. U. S., 64 Ct. Cl. 241 (6 A. F. T. R. 6592).

In U. S. v. Supplee-Biddle Co., 265 U. S. 196, 4 A. F. T. R. 3989: this Honorable Court said (with reference to life insurance policies):

> "Assuming, without deciding, that Congress could call the proceeds of such indemnity, income, and

> validly tax it as such, we think * * * such a purpose on its part should be express, as it certainly is not here. * * * The result of the construction put by the government upon Secs. * * * would be to impose a double tax on the proceeds of the two policies in this case * * * i. e. an income tax and an estate tax. Such a duplication, even in an exigent war-tax measure, is to be avoided unless required by express words."

In Commissioner vs. Whitehouse, 38 Fed. (2nd) 162 (C. C. A. 1st Cir.), the attempt was made to tax an annuity for $5,000, provided for under the will of James Gordon Bennett. The question was whether the annuity was a gift or bequest or distributive income. In affirming the ruling of the Board of Tax Appeals that the annuity was a bequest and therefore not taxable as part of the annuitant's income, the Court said:

> "If material, we assume that all of the annuities were subject to the estate tax; so that to sustain the Commissioner's construction would involve double taxation—a result 'to be avoided unless required by express words' of a tax act."

The Estate Tax is not imposed upon the interest that ceases but on the interest that passes. If it were upon the interest that ceases, then life estates would be taxed to the estate of the life tenant. Therefore, while it might be argued that the interest of a spouse in property held as tenant by the entirety has many of the attributes of a life tenancy, this argument is of no force in view of the decision of this Honorable Court in Tyler vs. United States, 281 U. S. 497, holding that the death of one of the parties to the tenancy becomes the generating source of important and definite acquisitions to the property rights of the other. Therefore an estate tax having already been paid on an interest forming a part of the corpus of the decedent's estate, as required by statute, it

amounts to double taxation to attempt to tax any part of that same corpus value a second time under the guise of income in the hands of the recipient thereof.

If a definite property value is rightly part of the corpus of the estate of a decedent for estate tax purposes, it cannot, by any stretch of the imagination, become income to the person who comes into the enjoyment of that corpus value at and by reason of the decedent's death. Its status as corpus is definitely fixed by its appraisal and taxation under the estate tax. This value may earn income and the property itself may enhance in value and such enhancement becomes income when realized upon, but this corpus value itself is beyond the reach of the taxing power under income tax statutes.

CONCLUSION.

It is, therefore, respectfully submitted that the Circuit Court of Appeals for the Fourth Circuit erred in holding that in computing the profit upon the sale by the petitioner as surviving tenant of property held by petitioner and her husband as tenants by the entirety, the basis for such computation should be the cost of such property instead of the cost to the surviving tenant plus the appreciated value of the husband's investment at the date of his death, and therefore said decision should be reversed.

Respectfully submitted,

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